Supreme Court, U.S.
FILED
OCT 11 1996
OFFICE OF THE CLERK

No. 96-582

IN THE
Supreme Court of the United States
October Term, 1996

Westboro Baptist Church, Inc.,
Petitioner

vs.

St. David's Episcopal Church

ON PETITION FOR WRIT OF CERTIORARI
TO THE KANSAS COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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This petition pertains to a preliminary injunction by a trial judge in Topeka, Kansas, against Westboro Baptist Church in favor of St. David's Episcopal Church which created a buffer zone against picketing 30 minutes before and after religious services, after Westboro had conducted anti-homosexual lawful religious public picketing outside of St. David's church building for several years.

Before seeking an injunction against Westboro's picketing, St. David's engaged in counter-picketing outside of its own church building for a period of about seventeen months. St. David's claimed Westboro's picketing was a private nuisance because alleged words by a few of the picketers were interfering with the "worship experience" (921 P.2d at 829) of some of the counter-picketers. The injunction was upheld on appeal by the Kansas Court of Appeals, on a finding that an injunction could issue against lawful private picketing on a public sidewalk to protect the "worship experience" of persons who disagreed with the words, uttered and on signs, of the picketers. The Court of Appeals assumed Westboro's words were protected and lawful in its opinion.

A. Was it error for the state courts to find that a church building is entitled to the same level of privacy as a residence?

B. Was it error for the state courts to fail to recognize that St. David's had waived any privacy interest claimed in the church building or during any religious worship service by its own public actions?

C. Was it error for the state courts to enjoin picketing without any finding that any activity by the picketers was unlawful?

D. Was it error for the state courts to enjoin more than "focused picketing"?

E. Is the state court injunction content neutral, or does it burden more speech than necessary to accomplish any legitimate government interest?

F. Was it error for the state courts to find that the government could be forced to protect the "worship experience" of St. David's churchgoers from alleged private interference by Westboro's picketers, in violation of the Free Exercise Clause and the Establishment Clause?

G. Was it error for the state courts to treat Westboro's picketing as a nuisance, and thereby allow the imposition of civil liability against lawful, protected activity, especially in the absence of any allegation or evidence of any violent or unlawful actions by Westboro's picketers, and based solely on a subjective, emotive claim that Westboro's message interfered with the "worship experience" of St. David's churchgoers?

H. Was it error for the state courts to afford Westboro's speech less protection because children were allegedly present?

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REFERENCE TO OFFICIAL REPORT OF OPINION

St. David's Episcopal Church v. Westboro Baptist Church, 22 Kan.App.2d 537, 921 P.2d 821 (1996).[1]

CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

A. Date of the entry of the judgment or decree sought to be reviewed: The Kansas Court of Appeals' opinion was issued June 21, 1996.

B. Date of any order respecting a rehearing: On August 7, 1996, the Kansas Court of Appeals denied a motion for rehearing or modification. On September 9, 1996, the Kansas Supreme Court denied a petition for review.[2]

C. Statutory provisions conferring on this Court jurisdiction to review the judgment or decree in question by writ of certiorari: 28 U.S.C. Section 1257 permits review by writ of certiorari of a final judgment by the highest court of a State in which a decision could be had where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of the

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[1]The only parties to the proceedings at the lower court are reflected in the caption, St. David's Episcopal Church and Westboro Baptist Church, Inc. Westboro has no corporate affiliate. The corporate affiliations of St. David's are unknown.

[2]K.S.A. 60-2101(b), K.S.A. 22-3602(d) and Kansas S.Ct. Rule 8.03(e)(1) provide for review by the Kansas Supreme Court as a matter of right from a final decision of the Kansas Court of Appeals in a case in which a question under the Constitutions of the United States or the State of Kansas arise for the first time as a result of said decision.

United States.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

First Amendment to the United States Constitution: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fourteenth Amendment to the United States Constitution, Section 1: .... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONCISE STATEMENT OF THE CASE

Westboro Baptist Church is a small Old School Baptist Church in Topeka, Kansas. Beginning in early 1991 Westboro began a ministry of public religious pickets with a central message of "God Hates Fags[3]". In connection with the ongoing debate in this country about homosexuality, Westboro and her picketers are determined to introduce into the discussion, through lawful picketing, such messages as, "Why did God destroy Sodom and Gomorrah?", "Remember Lot's Wife"

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[3]Westboro uses this term not to be gratuitously pejorative, but advisedly, as it is a Bible word, translated in Amos 4:11 "a firebrand". The word means, loosely, fuel for fire, and is appropriate given Westboro's message. The etymology of the currently politically correct term, the word "gay," persuades Westboro that it is not an acceptable or proper alternative.

(Lk. 17:32), "Love = Truth", "Fags = AIDS = Death", "Hate is a Bible Value", "Fear God", "One Man, One Woman, One Life" and "Fag God = Rectum[4]".

The picketing is a religious practice, done pursuant to a sincerely held religious belief that the Lord's people should, while on this earth, speak with the people in the gate (Ps. 127:5), cry aloud, spare not, lift up their voices like a trumpet, and show the people their sins (Isa. 58:1), and lift up a banner (Ps. 20:5) or ensign (Isa. 18:3) to the people bearing a gospel message. Westboro has engaged in this picketing ministry continuously from early 1991 to the present date, at places all around the country. Westboro pickets daily, and has conducted a minimum of 10,000 pickets to date.

With time Westboro began picketing at the intersection of 17th Street & Gage Boulevard, two main streets in Topeka, Kansas. St. David's Episcopal Church is on the northwest corner, with front doors facing 17th Street. St. David's has no point of access or ingress/egress from the east or south. Persons attending church at St. David's park in the church's parking lot to the west of the building, and when there is occasional overflow, in a bank parking lot across 17th Street to the south. (This bank is patronized by Westboro and several of her members.)

Westboro originally picketed mainly on the four corners of the intersection. Picketers did not originally stand on the sidewalk that ran directly in front of St. David's, running east and west, or on the sidewalk directly in front of the bank and bank parking lot running

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[4]This is an application of the language at Phil. 3:19, "whose god is their belly," the exposition of which is that those who live a God-defying life find their god (that which they serve) in that which brings them pleasure.

east and west, on 17th Street.

Westboro picketed at this location to convey a religious message about homosexuality to persons attending St. David's, and to warn those passing by. Westboro's picketers carried various signs with references to the position taken by St. David's Episcopal Church, and the Episcopal church, about homosexuality.[5]

Before, during and after the period of Westboro's picketing, St. David's engaged in a series of public activities related to the issue of homosexuality and Westboro's picketing. These activities included using the occasion of religious worship services to criticize Westboro's picketing, privately and on camera (including for ABC's *20/20* program); counter-picketing against Westboro at a local park; making public speeches in the community condemning Westboro's message, and about homosexuality and the church's response to that lifestyle; running ads in the local paper on these subjects; posting large signs outside St. David's church building with such messages as "God's Love Speaks Loudest"; inviting the public to join in opposition to Westboro's religious public activism; holding meetings in the church building to plan and organize activities to counter Westboro's religious public activism; contacting local office holders (such as City Council members) to seek punishment or limits on Westboro's picketing; and so forth. St. David's church building was the platform for, and worship services the centerpiece of, these activities.

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[5] [5] Samples of Westboro's signs include "Fag Church", "Fags Wed Here" [in reference to the Episcopalian church's support for homosexual marriages], "Layne = Spong" [in reference to St. David's clergy and an Episcopalian leader named Spong who has written nationally in support of the homosexual lifestyle, and has spoken at Foundary Methodist Church, President Clinton's church of choice, as recently as last December, referring to Jesus Christ as a "drag queen"], etc.

At the same time, the Episcopal Church (like other churches and denominations) took public positions about homosexuality through a variety of means, including press statements and appearances by national church leaders. Also in this time period, nationally, statewide and locally, the Episcopal Church, through its leaders, introduced the topic of homosexuality to its members for discussion and consideration, including whether homosexuality should still be considered a sin, whether homosexual marriages should be recognized and whether homosexuals should be permitted to serve as clergy. In this period, a Kansas Episcopal bishop widely circulated a position paper, provoking further discussion on these subjects.

By these and other means, St. David's members and leaders became directly involved in the public debate about homosexuality, and how society and the churches should respond to a national "coming out" and all else that the homosexual agenda entails. Hence, Westboro picketed at 17th & Gage commencing in February, 1992.[6]

After Westboro commenced this picketing, St. David's began counter-picketing at the same intersection, and invited the public to join them. The counter-picketers placed themselves on the four corners next to Westboro's picketers. With time picketers and counter-picketers began to string out down the sidewalks on both sides of 17th Street, going from the intersection to the west.

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[6] Westboro similarly has picketed at other churches, in Topeka and elsewhere, and at the headquarters of different denominations at various places throughout the country, because of the position taken by various churches and denominations about how the church should respond to homosexuality. All such picketing is done pursuant to a strongly and sincerely held religious belief by Westboro and her members that the Lord's people in the earth have a duty to "cry against the alter" (1 Ki. 13:2) and otherwise publicly convey the message of the Bible on important, timely, soul-of-the-nation-impacting issues.

Picketers and counter-picketers alike lined up on the sidewalk directly in front of St. David's, on the north side of 17th Street, from the intersection to where the sidewalk ended at St. David's driveway. Both groups commingled and co-existed for months. At times there were verbal exchanges. On a rare occasion there was minimal physical contact, amounting at most to jostling and sign-space jockeying. The only evidence of this limited physical contact came from Westboro's affidavits, and reflected that those who joined St. David's counter-picketing precipitated this contact.[7] This picketing and counter-picketing continued for a period of months, and into the Summer of 1994.

Westboro picketers specifically do not engage in acts of civil disobedience, do not picket in the street or in drives, do not block drives or doorways, and do not otherwise participate in the kinds of acts some picketing groups deem necessary to their cause. Westboro's picketers place themselves on public sidewalks, and when pedestrians and cyclists come through, the walk is cleared. No picketing is done on the church's property, access is not blocked in any way, and literature is not

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[7] The record reflects three physical altercations in the vicinity of 17th & Gage. Two occurred outside the buffer zone. Both involved attacks *against* the Westboro picketers by persons passing by who disagreed with their message. No St. David's person was involved in these incidents, and Westboro's picketers were the victims. The local prosecutor, who campaigned on a promise to get Westboro's picketers off the streets if elected, prosecuted Westboro picketers over these incidents, and not the attackers. The cases resulted in acquittal or dismissal. On a third occasion, a young man who attends St. David's ran from St. David's church building, when no picketing by either side was occurring, spotted Westboro's preacher, Fred Phelps, in a truck at a red light headed east on 17th Street, ran to the truck and struck Mr. Phelps in the face through the open window of the truck. *Never* was any physical altercation or violence, or threat of physical altercation or violence, by the Westboro picketers toward St. David's picketers or churchgoers, alleged or shown.

forced on persons passing by. No effort is made to physically deter anyone from going into St. David's or any other church. Westboro picketers post themselves with their signs and let their signs convey their message. Westboro picketers also, from time to time, engage in the singing of hymns *a cappella*.

On June 13, 1994, St. David's filed a civil action in the District Court of Shawnee County, Kansas, against Westboro. St. David's alleged that Westboro's picketing was a nuisance. Westboro removed the case to federal court because of the constitutional issues presented. The federal court remanded the case to state court on July 5, 1994.

On July 18, 1994, St. David's filed a motion for a temporary restraining order. St. David's submitted affidavits which recited some limited alleged words spoken by a handful of Westboro picketers during the period of picketing/counter-picketing. The affidavits averred that the words were upsetting to the hearers, who were predominantly counter-picketers (and only some of whom were actually members of St. David's). Most of the specific incidents alleged occurred outside of the buffer zone sought. The affidavits by St. David's did not recite any act or use of physical force by Westboro's picketers; did not recite any criminal activity by Westboro's picketers; did not recite any blocking of access into the parking lot of building by Westboro's picketers; and did not recite any disruption of traffic flow around the intersection.

Some of the affidavits *opined* that violence may erupt, because of the affiants' violent disagreement with Westboro's words, allegedly uttered and on their signs. The theme of the affidavits was hysterical hyperbole, with abundant synonyms for "I am offended", and suggestions that strong reaction to words might turn physical. The

words allegedly uttered by Westboro's picketers, and the words on the picketers' signs, were characterized as having the intent of provoking or the potential for violence. The state courts elevated these characterizations to the level of a "potentially violent atmosphere" (921 P.2d at 829), and justified the injunction accordingly.

The affidavits are heavily laced with strong statements of disagreement with the *words, including frequent references to the words on the signs*, and with expressions of strong emotive reaction by the listeners.[8]

On July 19, 1994, the trial court conducted a telephone conference with counsel. During that conference the trial court advised Westboro's counsel that Westboro could make a response to the request for temporary injunction by July 21, 1994, at 12:00 noon.

On July 21, 1994, between 10:50 and 11:00 a.m., Westboro's counsel hand-delivered extensive material in opposition to the motion for temporary restraining order, including numerous affidavits, photographs and other items of evidence, and several hours of video footage of

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[8] E.g., "If defendants were Christians, they would understand the celebrations of Christmas and the Advent season." "Their messages of filth portrayed on their signs many times have no relevance whatsoever to any potential issue with our parish." "I find that the signs displayed by members of the Westboro Baptist Church offensive [sic], and I find that the language used by the members of the church is offensive, and I truly believe that much of the language that is spoken is said with the intent to cause some kind of verbal or physical reaction from the members of St. David's." "I do continue to go to church, but every time I see the Phelpses, I develop a feeling of hostility and it takes several minutes for me to be inside the church and inside the service before I get centered enough to appreciate the worship service that I came for." "Among the signs held by members of the church were signs that stated 'God Hates Fags' and other signs purporting to give specific biblical citations to support the proposition that God hates homosexuals."

pickets at St. David's.

Before receiving any of this material, the trial court contacted the local Sheriff, at about 9:30 a.m. on July 21, 1994, and arranged for Sheriff's deputies to meet him at the intersection of 17th & Gage to take measurements for the entry of a TRO. This meeting at St. David's occurred from about 11:15 a.m. to 11:30 a.m. The trial court entered a TRO on July 21, 1994, at 2:00 p.m., about three hours after Westboro delivered her response and evidence.

The trial court made no finding that Westboro's picketing was unlawful in any respect, or that any Westboro picketer had committed any criminal or civil wrong. The trial court entered no order with a less restrictive injunction or other directives about the manner of Westboro's picketing. The trial court made no finding, and there was no evidence to support any finding, that Westboro ever disrupted the flow of traffic or physically blocked access to St. David's church building.

The TRO prohibits Westboro from engaging in "focused picketing" within 36 feet to the east, west and north and 215 feet to the south of St. David's church property one half hour before or after a religious event. The effect of this injunction is to move Westboro's picketers across Gage Boulevard during the prohibited period, including from the northwest corner of the intersection, where it is undisputed there is no ingress or egress, and including from the southwest corner of the intersection, which is not on the same side of the street as the property owned by St. David's, and is not directly adjoining St. David's property.

"Focused picketing" was originally defined as driving, standing, sitting or walking at a deliberately slow speed or walking repeatedly past or around plaintiff's

house of worship while carrying a banner, placard or sign. Westboro picketers were also prohibited from making any noise by singing, chanting, shouting or yelling, that could be heard through the walls of the church during any religious event. On July 27, 1994, the trial court amended the TRO and redefined "focused picketing" to prohibit the presence of Westboro picketers within the buffer zone during the prohibited period with or without a banner, placard or sign.

On July 25, 1994, Westboro filed a motion to vacate, alter, amend or modify the TRO. The motion was overruled on August 9, 1994, and the TRO remained in full effect. On November 28, 1994, Westboro filed a motion asking the trial court to dissolve or modify the TRO. Westboro requested to picket on the northwest and southwest corners of the intersection, which were not access or ingress/egress points for any churchgoers. Westboro also asked permission to picket directly in front of St. David's church building during services where traditionally no children were present (such as the early Sunday morning time period). After a brief hearing on December 19, 1994, all requests were denied. On March 16, 1995, the order denying modification or dissolution of the TRO was journalized. On April 13, 1995, Westboro filed a notice of appeal to the Kansas Court of Appeals.[9]

On June 21, 1996, the Kansas Court of Appeals upheld the injunction. That court noted in its opinion that no determination had been made that Westboro's speech was unprotected. "In its TRO, the trial court ... deferred

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[9] This appeal was based on Kansas statute which permits an immediate appeal from a preliminary injunction, and legal authorities which indicated that the TRO was a preliminary injunction, by its nature, scope and duration. St. David's challenged jurisdiction at the outset of the appeal, and the Kansas Court of Appeals concluded that it should retain the appeal.

the issue of whether Westboro's picketing involved unprotected speech." 921 P.2d at 827. "[B]ecause the trial court has not yet addressed the issue of whether Westboro was employing unprotected speech in its picketing activity, this court is not in a good position to determine that issue." 921 P.2d at 828.

The Kansas Court of Appeals "[had] a problem with the [trial] court's order proscribing noise" *because* "there is nothing in the affidavits which accompanied St. David's petition which suggests that the noise from Westboro's picketing activity was interfering with the worshiping by St. David's." 921 P.2d at 832. Yet the Kansas Court of Appeals upheld the injunction based upon its perceived obligation to protect *the "worship experience"* during this non-disrupted religious worshiping from disruption by private citizens. A petition for review to the Kansas Supreme court was denied on September 9, 1996.

WHERE THE CONSTITUTIONAL ISSUES WERE RAISED WITH THE STATE COURTS.

All of the constitutional issues addressed before this Court in this petition were raised with the trial court, as noted above, at least twice, through Westboro's response to the request for TRO and motion to vacate, modify, etc., the TRO, both filed in July, 1994. Some of the issues were also raised in a further motion to modify filed in November, 1994. These issues were all also presented to the Kansas Court of Appeals, in briefs filed before the June 21, 1996, opinion, and in a motion for rehearing or modification filed with that court. These issues were all also presented to the Kansas Supreme court in Westboro's petition for review to that court.

REASONS THE WRIT SHOULD ISSUE

A. IT WAS ERROR FOR THE STATE COURTS TO FIND THAT A CHURCH BUILDING IS ENTITLED TO THE SAME LEVEL OF PRIVACY AS A RESIDENCE.

The effect of the state court injunction was to afford to a church building the same level of privacy that this Court has afforded a residence. In so doing, the state courts overlooked the vast difference between those two buildings. Throughout their orders, the state courts spoke of protecting religious worship services. Yet the record clearly reflects that there was never any allegation that the worship services were being disrupted. Thus, the reality of the injunction is that it afforded a privacy interest in the church building to such a degree that public lawful religious picketing on a public sidewalk was prohibited in the absence of any unlawful acts, any finding of civil wrong, and any disruption of a religious worship service. Further, the injunction protected a church building that was being used to avidly promote a position on an ongoing public issue.

The state courts made no distinction between the church building and worship services.[10] Such a distinction is critical. A residential building has only one use and purpose, which is to serve as a residence. A church building, on the other hand, has many uses and purposes beyond religious worship services. Those uses and purposes are very public, and have a significant

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[10] The Court of Appeals interchanged the "place of worship" and the "religious worship" in justifying the injunction. "We agree with the trial court and find that, in addition to the government interest in protecting residential and clinical privacy, the government has a legitimate interest in protecting the privacy of one's place of worship as well." 921 P.2d at 830. "[O]ne's religious worship may not be unduly disturbed by another anxious to preach a different religious or social philosophy." *Id.*

impact on the community and society as a whole. Activities occurring in church buildings historically have had considerable power, influence and impact on public issues. Those uses and purposes are entirely inconsistent with a conclusion that church buildings should be afforded the same level of privacy as residences.

There was no allegation by St. David's that the worship services were disrupted. Further, if *actual disruption* had occurred of St. David's religious worship service, *while the worship service was in session*, St. David's had a ready remedy at hand, in the form of a Topeka City Ordinance which prohibits the disruption of a religious worship service. No such relief was ever sought, because no disruption of religious worship services was occurring.[11]

The petition and affidavits filed by St. David's in this case do not allege that disruption of a religious worship service occurred. Indeed, the Court of Appeals noted that "there is nothing in the affidavits which accompanied St. David's petition which suggests that the noise from Westboro's picketing activity was interfering with the worshiping by St. David's." 921 P.2d at 832.

This Court has noted that the relevant inquiry to determine whether privacy should be afforded a building is the use of the building. *Grayned v. Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Brown v. Louisiana*, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966).

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[11] Similarly, Kansas statute prohibits disorderly conduct, which the Kansas Supreme Court has construed to mean fighting words. See K.S.A. 21-4101 and *State v. Huffman*, 228 Kan. 186, 612 P.2d 630 (1980). So if Westboro's picketers were using fighting words, a remedy was available.

> The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." 408 U.S. at 116, 92 S.Ct. at 2303.

The use of church buildings in American communities, historically and increasingly, is completely inconsistent with a ruling that the church building should be treated as a residence building.

B. IT WAS ERROR FOR THE STATE COURTS TO FAIL TO RECOGNIZE THAT ST. DAVID'S HAD WAIVED ANY PRIVACY INTEREST CLAIMED IN THE CHURCH BUILDING OR DURING ANY RELIGIOUS WORSHIP SERVICE BY ITS OWN PUBLIC ACTIONS.

The state courts completely disregarded St. David's waiver of any claimed privacy. It is important to recall that Westboro's picketing and St. David's counter-picketing occurred simultaneously for seventeen months. Indeed, St. David's specifically and purposefully came to the public sidewalks outside its own building and engaged in public picketing. St. David's picketed in the same physical location as Westboro, after announcing with great public flourish their intent to do so, and then inviting other to join them. Thus, it is incredible that after many months of picketing by its members, St. David's filed a petition and affidavits claiming that picketing on the public sidewalks outside the church building constituted a private nuisance and interference with the "worship experience". (This position can only be explained by recognizing that St. David's position is content-based.)

In addition to counter-picketing, St. David's engaged in substantial additional public activity, using the church building as its platform, and religious worship services as the time, to engage in these public activities.

The language of this Court in *Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 2294-2295, 65 L.Ed.2d 263 (1980), and the legal principle announced there, was ignored by the state courts. The legal principle announced is that privacy, even in a residence building, can be waived, if the building is used for "nonresidential" purposes. Examples given by this Court are using the building for a precinct committee meeting, or posting signs and posters supporting a candidate in the windows or yard. By those simple acts, the residential privacy zealously protected by this Court can be waived.

Even if a privacy interest should be afforded a church building, or the "worship experience", St. David's has waived its privacy. St. David's used its building for non-religious-worship-service purposes repeatedly and continuously. Further, St. David's used its religious worship services, and the "worship experience", to publicly promote a position on homosexuality repeatedly. This is a clear waiver of any privacy interest in the church building, even if that building was entitled to the same level of protection as a residence building. St. David's waiver of the privacy interest it claimed was utterly ignored by the state courts.

C. IT WAS ERROR FOR THE STATE COURTS TO ENJOIN PROTECTED, LAWFUL PICKETING WITHOUT ANY FINDING THAT ANY ACTIVITY BY THE PICKETERS WAS UNLAWFUL.

St. David's did not allege that the picketers were acting unlawfully, by their words or their picketing. Instead, they alleged that the message was interfering with the "worship experience", and they feared the message would prompt violence because they violently disagreed.

It is important to note that St. David's was video taping the picketing/counter-picketing sessions for many

months, and had full control over what was videotaped from inside the church building. No video footage was introduced which reflected any churchgoer inside the church building who was upset or in any manner deterred from fully participating in worship services.[12] Nor was any video footage introduced which suggested that Westboro's picketing left the public sidewalk and went into the building, in any manner. In short, there was neither evidence of any kind, nor allegation of any kind, that the picketing/counter-picketing activity was having any impact on the religious worship services.

The injunction in this case was issued on the assumption that Westboro's speech and picketing was protected.[13] Indeed, the petition and affidavits do not allege any unlawful *picketing*. Instead, again, they only allege that words were uttered by picketers which were allegedly offensive and which allegedly interfered, by some subjective assessment, with the "worship experience".[14] Thus, when the injunction was issued, and

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[12] To the contrary, video footage showed good cheer, laughter, and open, loud, group mocking of Westboro's picketers, including referring to her preacher as the "Prince of Darkness," a recognized reference to Satan. Video footage also showed hand holding prayer with supplications to the Almighty to help the counter-picketers in their battle against the "evil" and "hate" of the Westboro picketers. St. David's picketers had the full run of their "worship experience".

[13] "If the trial court finds Westboro has employed constitutionally unprotected speech as well in its picketing activities, then this issue will weigh even more in St. David's favor." 921 P.2d at 829. The troublin, question presented, then, is what *additional* restrictions would the state courts place on Westboro's picketing than the sweeping injunction that has been in place for over 26 months should a finding be made that Westboro's speech was unprotected?

[14] It is important to note that the material submitted by Westboro, while the trial court was at St. David's measuring the

through the many months it has been allowed to stand, it has enjoined lawful activity in every respect.

In *Lawson v. Murray*, ---- U.S. ----, 115 S.Ct. 2264, 132 L.Ed.2d 269 (1995), Scalia, J., concurring, an injunction against picketing which had been expressly found not to be tortious was condemned. There, as here, the injunction was entered in expressed reliance on this Court's opinion in *Madsen v. Women's Health Center, Inc.*, ---- U.S. ----, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). Justice Scalia said:

> The very episode before us illustrates the reasons for this distinction between remedial injunctions and unconstitutional prior restraints. The danger that speech-restricting injunctions may serve as a powerful means to suppress disfavored views is obvious enough even when they are based on a completed or impending violation of law. .... But the threat to the First Amendment becomes positively alarming when violation of the law is not even a necessary prelude to this expansive discretion--when the defendant's prior speech (and proposed future speech) has been expressly found not to constitute a crime or common law tort, and the only basis for the injunction is the nebulous "public policy" of the State enforced by an

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distance for a TRO, included substantial evidence that the allegations of the petition and affidavits were not true, or at a minimum were incomplete. Westboro contends that even if the content of the petition and affidavits is true, the injunction was unwarranted under the law. Westboro is compelled to note, however, that the allegations are not true, and the depiction of Westboro's picketers in the petition and affidavits would not be substantiated at a trial. It is important, however, before going into that arena, that the proper legal parameters for entering injunctions against *protected activity* be clearly established in light of the United States Constitution.

inherent equitable power. .... 115 S.Ct. at 2266.

What has happened in the instant case is even worse. The injunction was not issued on the basis of some "public policy". Instead, it was issued on the basis of the state courts' perception that it was obligated to protect a subjective "worship experience" from private encroachment.[15] Even though there was no allegation that the religious worship service had been disrupted or interfered with in any respect. Even though the sole allegation was subjective offense at words. Even though the manner in which the unthreatened and undisturbed religious worship service was protected was the disruption and removal of another church's religious worship service occurring on a public sidewalk. This is "positively alarming" indeed.

D. THE STATE COURTS WRONGFULLY ENJOINED MORE THAN "FOCUSED PICKETING".

This Court has defined "focused picketing" to mean, as a matter of law, only directly in front of the protected building. *Frisby* v. *Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). Any linear extension beyond the area directly in front of the building is prohibited by *Frisby* and its progeny. Any injunction which does more than remove lawful, peaceful picketers from the area directly in front of the protected building is

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[15] Although St. David's only claimed a loss of the "worship experience," and the Court of Appeals expressly noted no allegation or evidence of disruption of the worship service, at times the Court of Appeals justified the injunction by stating that it was in place to protect the privacy of the worship service. E.g., "Also, as noted by the trial court in its injunction, an additional important government interest at stake here is the right to worship one's religion without infringement." 921 P.2d at 830. "More broadly stated to apply here, one's religious worship may not be unduly disturbed by another anxious to preach a different religious or social philosophy." 921 P.2d at 830

prohibited. E.g., *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1105 (6th Cir. 1996), *cert. den.*, ---- U.S.----, 115 S.Ct. 2376.

An injunction which defines "focused picketing" as something more is, on its face, legally flawed. That is, even if a privacy interest is properly found in a church building, the government interest which applies is one of protecting privacy only directly in front of the building. The only manner in which the government can carry out that interest is by prohibiting "focused picketing". The injunction in this case prohibited picketing of a distance substantially more than "directly in front of".

The injunction here placed the picketers out of sight, and removed the message from the intended audience. See, e.g., *Horizon Health Center v. Felicissimo*, 282 N.J.Super. 323, 327, 659 A.2d 1387, 1389, *cert. den.*, 142 N.J. 547, 667 A.2d (1995) (requiring injunction be limited so that picketers still had some limited form of expression *in front of* the abortion clinic); *Feminist Women's Health Center v. Blythe*, 32 Cal.App.4th 1641, 1663-1664, 39 Cal.Rptr.2d 189 (1995) (upholding very limited injunction only because picketers were not barred from the front of the building, and persons going into abortion clinic still had to go directly past, within a few feet of, the picketers, and picketers had not been exiled to a nonaccessible location).

E. THE STATE COURT INJUNCTION IS NOT CONTENT NEUTRAL AND BURDENS MORE SPEECH THAN NECESSARY TO ACCOMPLISH ANY LEGITIMATE GOVERNMENTAL INTEREST.

The state courts said they relied on this Court's opinion in *Madsen* as justification for the broad injunction entered here. In *Madsen* the picketers acted unlawfully and ignored earlier orders of the state court. No such

circumstances were presented in this case.

The *Madsen* injunction was found to be content neutral, because it imposed "restrictions on petitioners incidental to their antiabortion message because they repeatedly violated the court's original order", 114 S.Ct. at 2523. The picketers in *Madsen* engaged in unlawful acts, repeatedly, integral to the picketing act. By contrast, the picketing acts of Westboro's picketers were undisputably lawful. The only behavior St. David's claimed was disruptive was words allegedly uttered by a few of the picketers, and the message of the words and signs. Because St. David's claimed to be having a violent reaction in opposition to these words, the state courts enjoined the picketing to "thwart potential violence", and promised further, "The trial court also expressly stated it was not yet ruling on whether the content of Westboro's message would be further restricted until after hearing evidence on the matter." 921 P.2d at 829; emphasis added. So, with no evidence of unlawful acts or violence, or threats of violence, the state courts enjoined lawful activity, and promised to place further restrictions in the future on the content of Westboro's speech.

Westboro submits that this injunction is not content neutral, and that St. David's entire position rests on its disagreement with the content of Westboro's message. Further, as noted otherwise in this petition, the government has no legitimate interest in protecting the "worship experience" under all these circumstances.

However, even assuming a content-neutral injunction with an underlying legitimate interest, this injunction burdens more speech than necessary, per *Madsen*. In spite of repeated references to *Madsen* to support the injunction, that injunction flies in the face of *Madsen*.

First, the 36-foot buffer zone was upheld (and even then called "debatable", 114 S.Ct. at 2527) in *Madsen* only in the areas, and to the degree, necessary to protect the flow of traffic, protect access and address the picketers' failure to abide by earlier court orders. Not so here. The buffer zone here is not tied to any access issue, because access was never blocked. It is not tied to any traffic flow issue, because there never was such an issue before the state courts. It can not be tied to refusal to abide by earlier orders, because there were no earlier orders. Instead, it is tied directly to taking an offensive message away from the intended audience, which is a thing prohibited in this country. And, in *Madsen* this all followed a 3-day evidentiary hearing.

Second, that portion of the buffer zone which included private property on the back and side of the clinic was not approved by this Court. 114 S.Ct. at 2528. Westboro asked the trial court to reduce the buffer zone to include the northwest corner of the intersection, because it was on the east end of St. David's building, where no parking access or ingress/egress occurred. There is no lawful basis for an injunction which goes this far, no matter what interest is claimed. Further, the injunction broadens to the south, taking in the southwest corner of the intersection, which is across the street from the church building, and a full half block away from the entrance to the bank parking lot. St. David's has no property on the south side of the street, and there is no interest served in broadening the injunction to this area. Except to take the message away from the intended audience.

Third, in *Madsen* this Court's majority struck the "images observable" provision of the injunction, noting that if there were signs which could be interpreted as threats or veiled threats, those specific signs could be prohibited, but could not be the basis for a broad

prohibition. 114 S.Ct. at 2528-2529. Applying this rule of law here, based upon some alleged words by a few picketers, which St. David's does not say were threatening, all of the picketers have been removed by a broad prohibition. Even if St. David's violent reaction to Westboro's alleged words, or words on signs, could be likened to or interpreted as threats, this Court said those specific words could be prohibited -- not all spoken or signed words of the entire group of picketers.

F. IT WAS ERROR FOR THE STATE COURTS TO FIND THAT THE GOVERNMENT COULD BE FORCED TO PROTECT THE "WORSHIP EXPERIENCE" OF ST. DAVID'S CHURCHGOERS FROM ALLEGED PRIVATE INTERFERENCE BY WESTBORO, IN VIOLATION OF THE FREE EXERCISE CLAUSE AND THE ESTABLISHMENT CLAUSE.

The Court of Appeals said that "the right of free exercise would be a hallow one if the government could not step in to safeguard that right from unreasonable interference from another private party". 921 P.2d at 830. Yet there is no allegation that the free exercise of religion was interfered with in this case. The only "right of free exercise" recognized in America is the right found in the Constitution, which by very definition is a right to be protected against by *government* intrusion. Worse, here that right was protected against alleged private intrusion, solely based on disagreement with the words of the private actor.

In *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 476, 108 S.Ct. 1319, 1339, 99 L.Ed.2d 534 (1988), Brennan, Marshall, Blackman, dissenting, this language is found:

> Should [any group] seek to force the Government to protect their religious practices from the

> interference of private parties, such a demand would implicate not only the concerns of the Free Exercise Clause, but also those of the Establishment Clause as well.

The state courts determined that the religious practices of St. David's are entitled to a higher level of protection than the religious worship service of Westboro occurring on the public sidewalk outside of the building before St. David's religious worship service begins. To carry out this protection, the state courts placed an extreme burden on Westboro's religious worship service, even though Westboro's services occur on public sidewalks, and before St. David's worship services begin. And this imposition has occurred *exclusively* on the basis of subjective, emotive complaints by St. David's about alleged words spoken by picketers on the public sidewalk to St. David's picketers. This finding by the state courts constitutes an extreme violation of the Establishment and Exercise Clauses.

At the same instant the state courts determined (contrary to the Exercise and Establishment Clauses) that they should protect a religious worship service from private interference, they did so by *restricting* Westboro's religious worship service. Westboro's religious worship service is entitled to the same level of protection -- from government, not private, interference -- as St. David's. *Jews of Jesus, Inc. v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319, 1324 (1st Cir. 1993), citing *Murdock v. Pennsylvania*, 319 U.S. 105, 108-109, 63 S.Ct. 870, 873, 87 L.Ed. 1292 (1943).[16]

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[16] The Court of Appeals quoted from and relied on *Kovach v. Cooper*, 336 U.S. 77, 86, 69 S.Ct. 448, 93 L.Ed. 513 (1949). That case briefly suggested that Person A could not go into a church and disturb Person B's religious worship service by preaching a contrary doctrine in the service. E.g., *Action v. Gannon*, 450 F.2d 1227 (8th Cir.

In *Lyng v. Northwest Indian Cemetery Protective Association, supra*, the majority said that governmental interference could not be prohibited solely on the basis of a claim that the government's actions interfered with the spiritual development of a group. Yet in this case, the state courts placed restrictions on private actions based solely upon a subjective claim of unsubstantiated interference with the "worship experience".

By this reasoning, a person need merely come to a court and say, "On such-and-such a date, I read or heard some words of a religious nature with which I strongly disagreed, and later when I was trying to engage in religious worship, I was so distracted by those words I heard or saw that I could not worship," and that court would intervene, and silence the speaker of the offensive words. It is difficult to imagine a greater trespass on the Exercise, Establishment and Free Speech Clauses.

G. IT WAS ERROR FOR THE STATE COURTS TO TREAT WESTBORO'S PICKETING AS A NUISANCE, AND THEREBY ALLOW THE IMPOSITION OF CIVIL LIABILITY AGAINST LAWFUL, PROTECTED ACTIVITY, ESPECIALLY IN THE ABSENCE OF ANY ALLEGATION OR EVIDENCE OF ANY VIOLENT OR UNLAWFUL ACTIONS BY WESTBORO'S PICKETERS, AND BASED SOLELY ON A SUBJECTIVE, EMOTIVE CLAIM THAT WESTBORO'S MESSAGE INTERFERED WITH THE "WORSHIP EXPERIENCE".

This Court has held that civil liability may not be imposed on the basis of protected activity, *even in the*

1971) (proper to enjoin black citizens from entering cathedral and disrupting church as part of civil rights demonstration). No Westboro picketer ever tried to disrupt, or in fact disrupted, St. David's religious worship service, or to preach a different doctrine in the service. That case and its progeny have no application here.

face of some isolated acts of violence. In *N.A.A.C.P. v. Claiborne*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) the United States Supreme Court set aside judgments against participants in a boycott and a civil rights organization which had been rendered on behalf of white merchants who claimed to have lost business and been damaged by the boycott. The purpose of the boycott was to secure compliance by civic and business leaders with a lengthy list of demands for equality and racial justice. The boycott was largely supported by speeches encouraging nonparticipants to join the common cause and by nonviolent picketing. The record in that case indicated that some isolated acts of violence had occurred (e.g., shots fired at a house, bricks thrown through a windshield), largely directed toward black persons who did business with the merchants being boycotted.

The rule of law derived from that case is that civil liability can not be imposed on protected activity. In this case, civil liability -- in the form of a threshold finding of private nuisance -- has been imposed on protected religious picketing. Worse, Westboro's picketing was labeled as unlawful strictly on the basis of contentions by persons offended by their words that <u>they</u> might become violent, which is contrary to the rule of law which prohibits the silencing of speech because of threats of violence by the listener.

There is no allegation that Westboro's picketing acts are unlawful, but it is the picketing that forms the basis for civil liability. Surely if actual acts of violence by some of the picketers in *Claiborne* can not justify imposition of civil liability, allegedly offensive spoken words during public debate can not form the basis for the imposition of civil liability against the picketing at issue here.

Treating the lawful, protected, religious picketing

of Westboro as a private nuisance, even on a threshold finding, and particularly in the absence of any finding that any picketing acts or extra-picketing-speech was unprotected, wrenches the Constitution beyond recognition. Further, treating the words of some of Westboro's members as a nuisance, in the face of an express supposition that the words are protected, is "flatly wrong", *Winfield v. Kaplan*, ---- U.S. ----, 114 S.Ct. 2783, 129 L.Ed.2d 894 (1994), Scalia, Kennedy & Thomas, dissenting.[17]

H. IT WAS ERROR FOR THE STATE COURTS TO AFFORD WESTBORO'S SPEECH LESS PROTECTION BECAUSE CHILDREN WERE ALLEGEDLY PRESENT.

The state courts afforded Westboro's speech less protection because children were allegedly present. Recall that the infrastructure of the Court of Appeals' opinion was that Westboro's speech was protected.

This Court has said that the government can assert an interest in shielding minors from indecent materials as part of their interest in safeguarding the psychological well-being of a minor. Those statements have been made in cases where the potential harm to children from material was evident, such as material promoting and displaying sexual performances by children, dial-a-porn with pornographic telephonic messages and so forth. Application of this rule of law is completely inappropriate where the material subject to coverage, and being treated and prohibited as "indecent", "may contain valuable literary, artistic or educational information of value to

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[17] There, as here, a preliminary injunction was issued on a threshold finding of private nuisance based upon picketing which included words which the North Carolina state courts said could be "interpreted as threatening". *Kaplan v. Prolife Action League of Greensboro*, 111 N.C.App. 1, 8, 431 S.E.2d 828, 831 (1993).

older minors as well as adults". *American Civil Liberties Union v. Reno*, 929 F.Supp. 824, 852 (E.D.Pa. 1996).

> The Supreme Court has held that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-213 [95 S.Ct. 2268, 45 L.Ed.2d 125] (1975) (citations omitted). In *Erznoznik*, the Court rejected an argument that an ordinance prohibiting the display of films containing nudity at drive-in move theaters served a compelling interest in protecting minors passerby from the influence of such films. The Court held that the prohibition was unduly broad, and explained that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." 422 U.S. at 213-14. As Justice Scalia noted in *Sable* [*v. Communications of California, Inc. v. Federal Commications Commission*, 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989)], "[t]he more pornographic what is embraced within the ... category of 'indecency,' the more reasonable it becomes to insist upon greater assurance of insulation from minors." *Sable*, 492 U.S. at 132 (Scalia, J., concurring). It follows that where non-pornographic, albeit sexually explicit, material also falls within the sweep of the statute, the interest will not be as compelling. *Id.*

The words of Westboro's picketers are not, as a matter of law, pornographic or obscene. The claim here is that some crude references to the physical act at issue

in this debate were offensive, and allegedly on a few occasions uttered while minors were in the vicinity. The use of a crude description of the homosexual act, in the midst of a debate about the response of society and churches to homosexuality, is beyond the pale of anything the law would call pornographic, obscene or unprotected.

The rule of law applied by the state courts to afford Westboro's public religious speech less protection has no proper application in this case. A great disservice is done to the Constitution when protected public debate on a vital issue is labeled pornography by dissenters, and on the basis of that label stripped of its protection. What would the state courts do with the graphic displays of how to use a condom to avoid AIDS which permeate the Internet? Or with the depictions of abortions used by pro-life groups to discourage women from having abortions? By the device of labeling such things "indecent" all public debate on all current critical issues could be silenced. If it can be done outside of a church building where debate is ongoing inside about homosexuality, it can be done anywhere!

Conclusion

In *Lawson v. Murray*, *supra*, Justice Scalia concluded his concurring opinion by saying:

> .... I think it of vital importance that *Madsen* quickly be limited to what it said, rather than what it did. ..... [C]larification of *Madsen* is ... unlikely to occur in another case involving the currently disfavored class of antiabortion protesters. .... 115 S.Ct. at 2267-2268.

This is the case in which *Madsen* should be clarified and limited. The Kansas state courts went well beyond what *Madsen* authorized. Speech which has been declared

protected has been restricted by a sweeping injunction. *Madsen* presented a case of ongoing unlawful picketing acts, and the injunction was only entered after failed efforts to contain the unlawful activity. The standard for a remedial injunction which this Court upheld has been over-and-mis-applied to lawful activity. Further, in the doing, a church building out of which a public debate has emanated has been afforded the same level of protection as a residence, or a medical clinic where life-threatening medical procedures occur.

This country is in the throes of a national debate about homosexuality. The churches in this country are at the forefront and center of that discussion. Many of the major denominations, including the Episcopalians, are leaving the Bible position on this subject. As an illustration, on October 12, 1996, as part of the Names Project-The Quilt In The Capitol, a group called the National Episcopal AIDS Coalition (NEAC) is having a "National Retreat". The group's logo: "Our Church Has AIDS". Speakers at this event will include Bishop John Spong, Martin Smith, Ed Browning, Kelly Brown-Douglas and Bill Countryman. These speakers will attempt to influence the nation on the subject of homosexuality and the related subject of AIDS. However one may characterize these speakers' positions on these issues, it would be inconceivable to suggest that other groups, including religious groups, should not have the freedom to lawfully picket, or otherwise publicly express a contrary view at this event.[18] This, however, is the precise nature of the injunction issued by the state courts.

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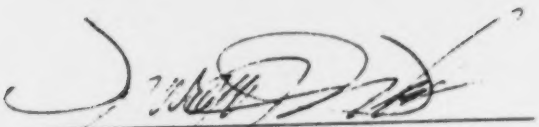
[18] In fact, Westboro picketers will picket this event, as well as a number of the other events scheduled in connection with the Names Project. Events that will be picketed include the National AIDS Candlelight March, "Rage Against the Dying of the Light," and "PFLAG's 15th Annual International Conference," all scheduled to occur in Washington the same weekend as this Episcopalian group's retreat.

Westboro respectfully asks that this Court review the injunction.

Respectfully submitted.



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